IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16 .03.2007

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

C.M.A.No.1503 of 2006
C.M.P.No.6734 of 2006

Sujatha ... Appellant/Defendant

vs.

1. Vijay Anand
2. Sabarinathan ... Respondents/Plaintiffs

Civil Miscellaneous Appeal is filed against the judgment and decree dated 31.08.2005 in A.S.No.23 of 2001 on the file of the District Court, Tiruvannamalai, remanding the case to the Trial Court in O.S.No.2 of 1998 on the file of the Additional Subordinate Court, Tiruvannamalai.

For Appellant : Mr.P.Veena
For Respondents : Mr.P.Valliappan

J U D G M E N T

The defendant is the appellant herein and the plaintiffs are the respondents. The Appeal is filed against the judgment and decree dated 31.08.2005 in A.S.No.23 of 2001 on the file of the District Court, Tiruvannamalai, remanding the matter to the trial Court in O.S.No.2 of 1998 on the file of the Additional Subordinate Court, Tiruvannamalai.

2. Plaintiffs' case is briefly as follows: The suit property was originally belonged to A.R.Anantha Ramanarayanan. Venakatachala Reddiyar purchased the suit property with his funds in the name of his wife, Andal ammal. Andalammal had no separate income to purchase the suit property. Venkatachala Reddiar had four daughters, viz., Lalitha, Shantha, Sugantha and defendant, Sujatha. Venkatachala Reddiyar along with his wife Andalammal had executed a registered Will on 16.07.1986 and the said Will was the last Will of Venkatachala Reddiar. Under the said Will, Sugantha was given life interest in the suit property. After her life time, the plaintiffs are in possession and enjoyment of the suit property. Venkatachala Reddiar died on 05.01.1993 and Andalammal died on 13.11.1996. The defendant has claimed that Andalammal said to have been executed a Will in her favour, is unsustainable and therefore, the plaintiffs have sent a legal notice to the defendant on 04.09.1997. The defendant has sent a reply to the legal notice on 24.01.1997. Andalammal had no

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absolute right over the suit property and she had no right to cancel the Will executed by herself and Venkatachala Reddiar. The claim of the defendant is illegal. Hence, the plaintiffs filed the suit for declaration, recovery of possession, for mesne profits and for accounting of the income from the date of suit till possession is given and for costs.

3. The defendant has filed a written statement contending that Lakshmana Ammal, mother of Andalammal, possessed 30 acres of land in Vazhaiyur Village. Lakshmana Ammal had two daughters, viz., Andalammal and Venkatachala Lakshmi. Out of 30 acres of land, Andal Ammal had got 15 acres of land in Vazhaiyur village. On 21.06.1974, Andal Ammal purchased the suit property measuring 7150 Sq.ft in T.S.No.2291/4 through the income derived from the above said 15 acres of land and the jewels presented to her at the time of her marriage from one A.R.Ananda Narayanan. Andal Ammal was the absolute owner of the property till her life time. Andal Ammal alone is entitled to the said property. Venkatachala Reddiyar had no right over the suit property and he was not in possession of the suit property at any time. Even Venkatachala Reddiar had no right to execute any Will in respect of this property. It is not correct to say that the Will dated 16.07.1986 executed jointly by Andalammal and Venkatachala Reddiar is the last Will of Andalammal. After the death of Venkatachala Reddiyar on 05.01.1993, Andalammal along with this defendant was living in the suit property inclusive of other properties. The defendant was looking after Andalammal till her life time. Andalammal executed a will in respect of the suit property in favour of this defendant on 30.06.1992 and it is her last Will. The defendant has sent a reply to the legal notice sent by the plaintiffs. After the death of Andalammal, the defendant was in possession and enjoyment of the suit property without interruption continuously till now by paying kist in her name. The suit is not maintainable and therefore, the same is liable to be dismissed with costs.

4. The trial Court framed the following issues for consideration:

i. Whether the will dated 16.07.1986 is valid?
ii. Whether the will dated 30.06.1992 is valid?
iii. Whether the plaintiffs are entitled to the relief of declaration?
iv. Whether the plaintiffs are entitled to recovery of possession of the suit property from the defendant?
v. Whether the defendant can be directed to submit the income from the suit property?
vi. To what relief, the plaintiffs are entitled?

5. Before the trial Court, the first plaintiff examined himself as PW.1. One Durairaj was examined as PW.2 and one Subba Reddiar was examined as PW.3. Exs.P1 to P4 were marked on behalf of the plaintiffs. The defendant examined herself as DW.1 and one Vetrivel was examined as DW.2. Exs.B1 to B9 were marked on behalf of the defendant.

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6. The trial Court, after considering both oral and documentary evidence, found that the will dated 16.07.1986 is not valid, whereas, the Will dated 30.06.1992 is valid. However, the trial Court has held that the plaintiffs are not entitled to the relief of declaration, recovery of possession and accounting of income from the suit property. In the result, the trial Court dismissed the suit with costs on 18.12.2000.

7. Against the judgment and decree of the trial Court, the plaintiffs filed an appeal in A.S.No.23 of 2001 on the file of the District Court, Tiruvannamalai and also an application in I.A.No.53 of 2001 for reception of a Will dated 12.08.1982 as additional evidence.

8. It was inter alia contended by the plaintiffs/appellants before the lower appellate Court that Venkatachala Reddiar had sufficient funds and means to purchase the suit property.

9. Learned District Judge framed the following issues for consideration,

i. Whether the suit property was purchased jointly by Venkatachala Reddiar and his wife Andal Ammal?

ii. Whether the Will, Ex.A1 is valid?

iii. Whether the Will, Ex.B2 dated 30.06.1982 is valid?

iv. Whether the plaintiffs/a[appellants are entitled to the relief as prayed 6for?

v. To what relief the plaintiffs are entitled to?

10. So far as issue No.1 is concerned, the learned District Judge raised a question as to the suit property belongs both to Venkatachala Reddiar and and his wife Andalammal or whether Andalammal alone had purchased the suit property and unless this question is decided, it cannot be decided as to whether the will executed under Ex.A1 or will executed under Ex.B2 is valid or not. So it is necessary to decide whether Venkatachala Reddiar had means to purchase the suit property. The will dated 12.08.1992 was filed as an additional evidence by the plaintiffs/appellants before the first appellate Court. There are certain recitals in the Will dated 12.08.1982, which show that Venkatachala Reddiar was owning a Mill, deriving income from the properties in Kadambai Village and he was doing money lending business. According to the plaintiffs, the original Will dated 12.08.1982 is in possession of the defendant and therefore, they have filed the registration copy of the will at the appellate stage.

11. The learned District Judge decided to remand the suit to the trial Court with a direction to the trial Court to give opportunity to the parties to adduce evidence regarding the reception of document dated

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12.08.2002 as additional evidence and dispose of the same within a period of three months from the date of receipt of the suit records from the District.

12. Aggrieved by the judgment and decree of the appellate Court, the defendant has filed this Civil Miscellaneous Appeal. The scope of remand under Order 41 Rule 23 is limited and the learned District Judge has committed an error in remanding the suit. As a condition precedent for the excise of power of remand, there shall be a finding by the appellate court that the judgment and decree of the trial Court are erroneous on facts or on law and therefore, the same are liable to be reversed or set aside. So long as the finding has not been arrived at there is no scope of the appellate Court reversing or setting aside the judgment and decree of the trial Court and as a consequence thereof remanding the suit for fresh disposal.

13. In a decision in Subramanian and another v. Kaliammal and others reported in 1968 (2) MLJ 548, this Court has held that the jurisdiction of the appellate Court to remand the case, arise only if the Court comes to the conclusion that the finding of the trial Court is erroneous and is liable to the set aside or reversed. In the absence of such conclusion, power of remand is not available to the appellate Court. As pointed out already, in this case, the appellate Court did not find any error in the finding of the trial Court or any default in the procedure.

14. In a decision in M/s.Sekaran Real Estates, a partnership firm, by Managing Partner, K.Chandrasekaran v. Punjab National Bank, Mylapore Branch, Mylapore, Madras-4, by its Manager, reported in 2000 (1) CTC 613, this Court has held that,

> "It is clear from the above decisions as well as the provisions contained in Order 41, Rules 23 to 29, C.P.C., that duty is cast on the appellate Court to find that the decree of the trial Court should be set aside. Even the fact that there are some defects or infirmities in the reasoning of the trial Court. The appellate Court should come to the clear conclusion that the findings of the trial Court cannot be supported and must be set aside. Only in exceptional cases where the judgment of the trial Court is wholly unintelligible or incomprehensible that the appellate Court can remand the suit for fresh trial. A reading of the judgment of the appellate Court would show that it has not at all considered the judgment of the trial Court nor pointed out any infirmity or defect in the conclusion. Further, the learned appellate Judge has not born in mind any of the principles mentioned above. A careful scrutiny of the judgment also shows that he never felt that the judgment of the trial Court must be set aside or reversed."

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15. In the case on hand, the learned District Judge has not reversed or set aside the finding of the trial Court. It is only to give opportunity to the plaintiffs to prove the Will dated 12.08.1982, the lower appellate Court has remanded that suit to the trial Court. The procedure adopted by the learned District Judge is not correct. The District Judge himself has got jurisdiction and powers under Order 41 and Section 151 C.P.C.

16. I am of the opinion that the order of remand of the suit cannot be sustained and therefore, the judgment and decree of the learned District Judge remanding the suit to the trial Court are set aside. The learned District Judge is directed to take the first appeal and I.A.No.53 of 2001 on its file and give opportunity to both parties with regard to the proof of the said document dated 12.08.1982 and dispose of the first appeal on merits.

17. In the result, the Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected miscellaneous petition is also allowed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

skm

To

1. The District Judge,
   Tiruvannamalai.

2. The Additional Subordinate Court,
   Tiruvannamalai.

3. The Record Keeper,
   V.R.Section, High Court, Madras.

1 cc To Mr.P.Valliappan, Advocate, SR.16778.

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